UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOSEPH EDWARD HAICK — CASE NO. 01-60500

Debtor — Chapter 7

SCOTT C. GOTTLIEB
and BETSY GOTTLIEB

Plaintiffs

vs. — ADV. PRO. NO. 02-80097

JOSEPH EDWARD HAICK

Defendant

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed on March 8, 2004, by Joseph Haick ("Debtor"), seeking leave to amend his answer in an adversary proceeding commenced on April

29, 2002, by Scott and Betsy Gottlieb ("Plaintiffs"). Opposition to the motion was filed electronically by the Plaintiffs on March 22, 2004.

The motion was heard at the Court's regular motion term in Binghamton, New York, on March 25, 2004. Following the hearing, the Court allowed the parties an opportunity to file memoranda of law, and the matter was submitted for decision on April 15, 2004.[1]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (I) and (O).

FACTS

The Debtor filed a voluntary petition pursuant to chapter 7 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), on February 2, 2001. In his Statement of Financial Affairs, he lists a lawsuit commenced by the Plaintiffs and others against him and his former employer, Whale Securities Co., L.P. On May 21, 2001, the Plaintiffs sought relief from the automatic stay to continue the proceeding, which was pending before the National Association of Securities

[1] The parties were given until April 15, 2004, to submit their memoranda of law. The Debtor filed his brief in support of his motion on April 14, 2004. Plaintiffs electronically filed their letter memorandum with the Court on April 15, 2004. On May 3, 2004, the Debtor filed his "Brief in Response to Plaintiffs' Letter-Memorandum Opposing Defendant's Motion to Permit Amendment." In a letter, dated May 6, 2004, the Court indicated to the parties that it would not consider the latter because of its untimeliness.

Dealers ("NASD"). The Court signed an Order on June 14, 2001, granting the Plaintiffs' motion with the proviso that any judgment or claim awarded by NASD in favor of the Plaintiffs as against the Debtor would be administered by this Court.

A notice was sent to creditors on or about February 5, 2001, informing them that the first meeting of creditors pursuant to Code § 341 was to be held on March 5, 2001. The same notice also apprized creditors that the deadline for filing a complaint objecting to a discharge of the Debtor or to determine the dischargeability of a particular debt was May 1, 2001.

The meeting of creditors was adjourned to March 30, 3001, and then to June 26, 2001. On April 27, 2001, the Court signed an Order approving a stipulation between the Debtor and the chapter 7 trustee ("Trustee"), dated April 23, 2001, extending the time to file a complaint objecting to a discharge of the Debtor until July 3, 2001. The language of the stipulation approved by the Court actually provides that

> the time within which complaints by the Trustee and/or creditor(s) in this case objecting to the discharge of the debtor(s) herein, and/or the dischargeability of a debt, is hereby extended by a period of sixty (60) days from the date now in place to July 3, 2001 . . . .

On June 22, 2001, the Court signed a second Order, approving a stipulation with similar language as above and extending the time for filing a complaint to August 31, 2001. This was made necessary because at the second § 341 meeting at which the Debtor provided certain documents, it became evident to the Trustee that further documentation was necessary. The meeting was adjourned to August 30, 2001. On August 24, 2001, the Court again approved a stipulation extending the deadline due to the fact that the meeting of creditors had been further adjourned to an unspecified date for medical reasons, involving the Debtor. The stipulation

contained the same language as the prior stipulations, thus extending the date for filing complaints pursuant to Code § 727 and § 523 to October 31, 2001.

On October 29, 2001, the Trustee filed a motion seeking to extend for the fourth time the period in which to file a complaint objecting to discharge pursuant to Code § 727 for an additional 180 days. In this instance, there was no stipulation for which the Court's approval was sought as had been the case previously. In his papers, the Trustee explained that ultimately the meeting of creditors had been rescheduled for September 12, 2001, but due to the events of September 11, 2001, was again adjourned to October 2, 2001. The Trustee indicated that on or about September 21, 2001, he was apprized by the Debtor's current counsel, Stanton M. Drazen, Esq. that the Debtor intended to retain other counsel to represent him.[2]

On November 15, 2001, the Court signed an Order providing that "the time for the trustee, a creditor, or the United States Trustee to file a complaint objecting to discharge under 11 U.S.C. § 727 [was extended] by an additional 180 days from the date now in place, to April 29, 2002." According to the Certificates of Service, the Trustee's motion, as well as the Court's Order of November 15, 2001, were served on Plaintiff Scott Gottlieb, as well as Plaintiffs' counsel, Daniel B. Berman, Esq.. The Plaintiffs did not file any opposition to either the motion or the Order.

By motion dated April 26, 2002, the Trustee sought a final extension of the time to file a complaint objecting to discharge pursuant to Code § 727 for an additional 180 days because the Trustee believed a further meeting of creditors would be necessary to obtain additional testimony from the Debtor. On May 16, 2002, the Debtor filed a response to the Trustee's motion, asking

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[2] On December 10, 2001, a Stipulation for Substitution of Counsel was filed with the Court indicating that Myles R. Wren, Esq. was being substituted as counsel for the Debtor.

that it be denied. Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), the Trustee filed a Notice of Proposed Compromise and Notice of Hearing on June 7, 2002, with respect to his request for a final extension to file a complaint pursuant to Code § 727(c). The Court signed an Order on July 8, 2002, extending the time for a period of one year to April 29, 2003, in which only the Trustee or the United States Trustee could file a complaint pursuant to Code § 727(c).

As indicated above, Plaintiffs filed their complaint ("Complaint") pursuant to Code § 523(a)(4) on April 29, 2002, seeking a finding of nondischargeability of any "damages awarded by the NASD in favor of the Plaintiffs, against the Defendant . . . ." Complaint at 4. The Debtor filed an Answer on May 24, 2002, asserting a counterclaim for damages and costs, including attorney's fees. In his Answer, he asserted the defense of failure to state a cause of action. He did not expressly assert an affirmative defense based on the statute of limitations.

On August 14, 2002, the Debtor filed a motion for summary judgment, seeking dismissal of the Complaint on the basis that it was not timely filed "and therefore [Plaintiffs] have failed to state a cause of action." Debtors' Motion, filed August 14, 2002, at ¶ 11. After several adjournments, the Plaintiffs filed opposition to the Debtor's motion on November 18, 2002, arguing that the Debtor had waived the defense of the statute of limitations by not raising it in his Answer or in a pre-answer motion. The Debtor took the position that the time limit set forth in Fed.R.Bankr.P. 4007(b) was a condition precedent, rather than a statute of limitations, and, therefore, need not be asserted as an affirmative defense at the risk of being waived. The Court orally denied the Debtor's motion from the bench at a hearing in Binghamton, New York, on November 21, 2002, finding that Fed.R.Bankr.P. 4007(b) was a statute of limitations which the

Debtor had to have raised as an affirmative defense in his Answer or the defense was deemed to have been waived or forfeited.

On December 11, 2002, the Debtor sought reconsideration of the Court's denial of his motion to dismiss the Plaintiffs' Complaint.[3] Ultimately, the motion seeking reconsideration was withdrawn by the Debtor and the motion, which is now before this Court, was filed on March 8, 2004 seeking to amend his Answer pursuant to Rule 15 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated in Fed.R.Bankr.P. 7015, to assert the affirmative defense that the Complaint was untimely filed.[4]

DISCUSSION

It is clear from the facts that the Plaintiffs' Complaint was untimely filed. The Court

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[3] The motion for reconsideration was originally scheduled to be heard on January 30, 2003, and was adjourned several times on consent of the parties. This appears to have been the same period in which the matter was being arbitrated before the NASD. Indeed, in letters dated September 24, 2003 and October 30, 2003, Plaintiffs' counsel indicated that the request was being made in order "to allow the NASD to render a decision which will determine whether this Adversary Proceeding will go forward or be discontinued." Letters from Daniel B. Berman, Esq., dated September 24, 2003 and October 30, 2003. The hearing on the Debtor's motion for reconsideration was ultimately held on February 26, 2004, at which time Plaintiffs' counsel represented to the Court that there had been an award of $120,000 in favor of the Plaintiffs in the NASD proceeding. He indicated that after a lengthy arbitration process lasting over a year, the award had been made without the issuance of a written "reasoned decision" indicating whether the award was based on a finding of fraud, negligence or breach of contract on the part of the Debtor, as had been alleged by the Plaintiffs.

[4] Despite representations by counsel for both parties at the hearing on February 26, 2004, on Debtor's motion for reconsideration, no order denying the Debtor's motion for summary judgment has ever been submitted to the Court by Plaintiffs' counsel; nor has Debtor's counsel ever submitted a written request that Debtor's motion for reconsideration be withdrawn.

signed an Order on June 22, 2001, extending the time for creditors, *inter alia*, to file a complaint pursuant to Code § 523(a) to October 31, 2001. The extension granted by Order, dated November 15, 2001, expressly states that creditors had until April 29, 2002, to file a complaint pursuant to Code § 727 only. Plaintiffs' counsel does not dispute that he received a copy of the Order of November 15, 2001, but failed to notice the change from the prior three orders, which approved stipulations between the Debtor and the Trustee extending the time to file complaints pursuant to both Code § 523 and Code § 727.

Whether or not to allow the Debtor to amend his Answer to assert the statute of limitations as an affirmative defense to the late filed Complaint is a matter of the Court's discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). As noted by the Supreme Court in a recent decision, "'leave [to amend] shall be freely given when justice so requires.'" *Kontrick v. Ryan*, 124 S.Ct. 906, 917 (2004) (quoting Fed.R.Civ.P. 15(a)). However, in exercising its discretion, a bankruptcy court "'must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities."' *In re Magno*, 216 B.R. 34, 38 (9th Cir. BAP 1997) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). Factors to be considered include undue delay, bad faith, futility of amendment or prejudice to the opposing party. *Foman*, 371 U.S. at 182; *Hanlin v. Mitchelson*, 794 F.2d 834, 840 (2d Cir. 1986).

In *Kontrick* the debtor, in a motion for reconsideration, first raised the untimely filing of the plaintiff's amended complaint after the bankruptcy court had granted summary judgment to the plaintiff and concluded that the debtor was not entitled to a discharge. *Kontrick*, 124 S.Ct. at 910. The debtor in *Kontrick* had not asserted the untimeliness of the amended complaint as an affirmative defense in his answer. The Supreme Court held that Fed.R.Bankr.P. 4004 was a

statute of limitations and that the debtor forfeited his right to assert the defense once the bankruptcy court had ruled on the merits of the plaintiff's motion for summary judgment and the debtor had lost the proceeding on the merits. *Id.* The court stated that a party's right to raise the defense "can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Id.* at 916. It did not define "too long" but did note that "[o]rdinarily, under the Bankruptcy Rules as under the Civil Rules, a defense is lost if it is not included in the answer or amended answer." *Id.* at 917. The court commented in *dicta* that even if the court were to equate the defense of statute of limitations with the defense of "failure to state a claim upon which relief can be granted" so as to fall within Fed.R.Civ.P. 12(h)(2), "the issue could be raised, at the latest, 'at the trial on the merits.'" *Id.* at 918.

Admittedly, in the matter *sub judice*, the Debtor did not wait until just prior to trial on the merits or until after there had been an adjudication on the merits before he raised the issue of the timeliness of the Plaintiffs' Complaint. Indeed, he first raised the issue on August 14, 2002, approximately three and a half months after the commencement of the adversary proceeding and almost three months after he filed his Answer, by filing a motion for summary judgment seeking to dismiss the Plaintiffs' Complaint because it had not been timely filed "and therefore [Plaintiffs] have failed to state a cause of action." Following several adjournments, on November 21, 2002, the Court, after concluding that Fed.R.Bankr.P. 4007 was a statute of limitations waivable if not pled, denied the Debtor's motion on the basis that he had forfeited his right to raise the defense predicated on Fed.R.Bankr.P. 4007 by not asserting it in his Answer.

The Debtor did not seek leave to appeal the Court's denial of his motion. Instead, as noted above, he filed a motion for reconsideration and sought several adjournments in part based

on the representations of Debtor's counsel that he was awaiting a determination by the Supreme Court in the *Kontrick* case concerning "whether the deadline set by Rule 4004 is mandatory and jurisdictional and thus cannot be waived." *Id.* at 913 n.7. If the Supreme Court had found that the rule governed a court's subject matter jurisdiction, the Debtor would have had a basis for his reconsideration motion. Unfortunately for the Debtor, the Supreme Court concluded that the rule was not jurisdictional and the defense could be forfeited "if the party asserting the rule waits too long to raise the point." *Id.* at 916. This served to reaffirm this Court's prior denial of the Debtor's motion for summary judgment. As a result, the Debtor withdrew his motion for reconsideration and filed the motion now before this Court on March 8, 2004. Yet, there was nothing preventing the Debtor from seeking permission of the Court to amend his Answer when the Court first denied his motion for summary judgment in November 2002.

So has the Debtor waited "too long" under the circumstances of this case? As the Supreme Court noted in *Kontrick*, , a defense is lost if it is not included in the answer or amended answer. Whether to allow the Debtor to amend his Answer requires the Court to consider the interests of justice that attend the circumstances of this case. Of particular import to the Court's determination is the issue of prejudice to the Plaintiffs if the Court were to grant the Debtor's motion. *See Ragin v. Harry Macklowe Real Estate Co., Inc.*, 126 F.R.D. 475, 478 (S.D.N.Y. 1989). If the Court is truly to be guided by the underlying purpose of Fed.R.Civ.P.15 to facilitate decisions on the merits, then the Court should proceed with the trial of the adversary proceeding and deny the Debtor's motion as did the court in *In re O'Brien*, 110 B.R. 27 (Bankr. D. Colo. 1990).

In *O'Brien* the bankruptcy court at trial orally denied the debtor's motion to amend his

answer to add the affirmative defenses of laches and statute of limitations. *Id.* at 30. The court noted that the debtor had untimely raised the affirmative defenses within ten days of the trial in violation of the court's pre-trial order and allowing him to amend his answer would have resulted in prejudice to the plaintiff. *Id.* In its written decision, the court also found "that failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." *Id.* (citing to both Fed.R.Civ.P. 8(c) and Fed.R.Civ.P.15); *see also United States v. Landau*, 155 F.3d 93, 107 (2d Cir. 1998).

Early on in this case, the Plaintiffs sought relief from the automatic stay in order to continue with a proceeding before the NASD for purposes of determining the amount of any claim they might have against the Debtor. That relief was granted by Order of this Court on June 14, 2001, approximately a week before the Court granted a second extension for the filing of complaints objecting to the discharge of the Debtor, as well as objecting to the dischargeability of a particular debt. According to Plaintiff's counsel, the parties were involved in lengthy arbitration for well over a year, and the NASD panel ruled in the Plaintiffs' favor shortly before the Debtor filed the motion now pending before this Court. Throughout the various extensions of time to file a complaint objecting to the Debtor's discharge or to determine the dischargeability of any specific debts, the Debtor had to have been aware that the Plaintiff intended to seek a determination of nondischargeability in the event that the Plaintiffs were successful before the NASD; otherwise, the time and expense in litigating the matter would have been for naught.

It would be highly prejudicial to the Plaintiffs to prevent them from having their "day in court" to litigate the issue of the nondischargeability of the debt established in the NASD proceeding. The Court concludes that the most appropriate resolution under the circumstances

is to go forward with a determination on the merits in the interest of justice.

Based on the foregoing, it is hereby

ORDERED that the Debtor's motion seeking to amend his Answer to add the affirmative defense of the statute of limitations is denied.

Dated at Utica, New York

this 26th day of May 2004

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge